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Nos. 89-556, 89-557 and 89-771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF LOUISIANA, *ex rel.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA,
Appellant,

STATE OF LOUISIANA, *ex rel.* CHARLES E. "BUDDY" ROEMER, GOVERNOR OF THE STATE OF LOUISIANA, *et al.*,
Appellants,

BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Eastern District of Louisiana

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* URGING DISMISSAL OF THE APPEAL

*JULIUS LEVONNE CHAMBERS
CHARLES STEPHEN RALSTON
NORMAN J. CHACHKIN
JANELL M. BYRD
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street
16th Floor
New York, NY 10013
(212) 219-1900

Counsel for Amicus Curiae
**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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State of Louisiana, ex rel. William J. Guste, Jr., Attorney General of the State of Louisiana;

State of Louisiana, ex rel. Charles E. "Buddy" Roemer, Governor of the State of Louisiana, et al.;

Board of Supervisors of Southern University and Agricultural and Mechanical College,

Appellants,

v.

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MOTION OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE URGING DISMISSAL OF THE APPEAL

The NAACP Legal Defense & Educational Fund, Inc., (LDF) respectfully moves the Court for leave to file the attached brief as amicus curiae supporting the position of the United States on the jurisdictional issue addressed herein.

The following parties have consented to the filing of this brief: the United States, the State of Louisiana (by the Governor), the Supervisors of Southern University A&M College, Board of Regents of the State of Louisiana, the Louisiana Board of Trustees for State Colleges and Universities, the Board of Supervisors of Louisiana State University and A&M College, and the Bossier Parish School Board. As of the time of filing this brief the Attorney General for the State of Louisiana has not granted consent.

LDF is a non-profit corporation organized under the laws of the State of New York. It was formed to assist

black citizens in securing their rights under the Constitution.[1]

This lawsuit raises important issues regarding the dismantling of formerly dual systems of higher education. LDF historically was involved in the major cases on this question that have been decided by this Court, and based on its experience believes that the law in this area should be developed upon full consideration by the Court with the benefit of intermediate appellate review in the Courts of Appeals.

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[1]Further description of the interest of amicus LDF appears at pages 2-5 of the attached brief, including a description of LDF's history of involvement in school desegregation litigation.

We respectfully submit that LDF's participation will be of assistance to the Court.

Respectfully submitted,

/s/ Norman J. Chachkin
*Julius LeVonne Chambers
Charles Stephen Ralston
Norman J. Chachkin
Janell M. Byrd
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street
16th Floor
New York, NY 10013
(212) 219-1900

Counsel for Amicus Curiae

*Counsel of Record

Question Presented

Whether the Court lacks jurisdiction to entertain this direct appeal under 28 U.S.C. § 1253 where the case was not required to be heard by a panel of three judges because no state statute, law, or regulation was challenged, sought to be enjoined, or actually was enjoined on grounds of its repugnance to the Constitution.

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS AMICUS CURIAE URGING DISMISSAL OF THE APPEAL

Interest Of The NAACP Legal Defense Fund As Amicus Curiae[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit corporation established to assist black citizens in securing their constitutional and civil rights. LDF historically has had and continues to have a major role in litigation efforts challenging discrimination and segregation in education.[2]

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[1]The Legal Defense Fund supports the position of the United States on the jurisdictional issue addressed herein.

[2]See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954). LDF represents plaintiffs in the litigation that resulted in the initiation of desegregation efforts in public higher education systems in 18 states, including the State of Louisiana. Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1973), modified and aff'd unanimously en banc, 480 F.2d 1159 (D.C. Cir. 1973). Other LDF higher education desegregation cases have included: Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Adams v. Lucy, 228 F.2d 619 (5th Cir.), cert. denied, 351 U.S. 931 (1956); Meredith v. Fair, 305 F.2d 343 (5th Cir.), cert. denied, 371 U.S. 828 (1962); Alabama State Teachers Association v. Alabama Public School and College Authority, 289 F. Supp. 784 (M.D. Ala. 1968), aff'd per curiam, 393 U.S. 400 (1969); Norris v. State Council of Higher Education for Virginia, 327 F. Supp. 1368 (E.D. Va.), aff'd mem., 404 U.S. 907 (1971); Geier v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984), aff'd, 801 F.2d 799 (6th Cir. 1986).

Based upon this institutional commitment to the elimination of discrimination in education, LDF agrees with the district court below that a state has not fulfilled its affirmative obligation to dismantle its de jure racially dual higher education system where substantial vestiges of the de jure system persist, as the record demonstrates is the case in Louisiana with respect to, inter alia, student enrollment, employment of faculty and staff, distribution and development of academic programs, financing, and school facilities.[3] In light of this showing of a continuing violation, LDF strongly supports the adoption of a remedial plan adequate to assure that those victimized by continuing racial discrimination and its effects are made whole. Such a plan must formulate remedies that promise to increase educational opportunities for the

[3]J.A. 291a-326a [United States' List of Material Facts to the Motion for Summary Judgment, filed May 13, 1988].

members of the class subjected to discrimination -- not limit them -- and courts supervising the remedial process must eschew ineffective or illusory remedies as well as devices that may harm and disadvantage black students in their attempts to surmount the dismal legacy of racially discriminatory education.

By virtue of its active participation in higher education desegregation suits, LDF has a significant interest in the instant appeal, and in particular LDF has a legitimate concern that the law in this area be developed upon a record that is subject to comprehensive review.[4]

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[4]This Court has emphasized that intermediate appellate review facilitates its consideration of important questions by helping to narrow and refine issues and by allowing full development and exploration of the legal theories underpinning a decision. See, e.g., Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 99 (1974) ("mediating wisdom of a court of appeals"); Florida Lime & Avocado Growers v. Jacobsen, 362 U.S. 73, 92-93 (1960) ("dominant principle of having this Court review decisions only after they have gone through two judicial sieves") (Frankfurter, J., dissenting).

Here, direct review from the district court's approval of the Special Master's report is not only contrary to law,[5] but also would be imprudent and likely to impair this Court's ability fully to consider and resolve the weighty issues framed in the Jurisdictional Statements. This case should first proceed in the Court of Appeals for the Fifth Circuit[6] and, in order to aid this Court's eventual jurisdiction over this matter, the stay issued by the Court should remain in effect during the pendency of appellate proceedings.

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[5]As argued infra at 14-28, the three-judge court was not "required" to hear this case and therefore the Court lacks jurisdiction to entertain this appeal.

[6]The appellants in this Court have all filed protective notices of appeal to the United States Court of Appeals for the Fifth Circuit.

Statement of Relevant Facts

1. Consideration Below Of The Jurisdictional Issue

To date no court has given full consideration to the propriety of empaneling a three-judge court in this case. When the case was filed in 1974, the United States requested that a three-judge court be convened pursuant to 28 U.S.C. §§ 2281 and 2284 (J.A. 184a). Without deciding the issue, the Chief Judge of the United States Court of Appeals for the Fifth Circuit designated the members of the special tribunal and directed that the three-judge court itself determine if the case was properly before it (J.A. 197a-98a). A three-judge district court was empaneled on April 16, 1974[7] but apparently failed to consider or resolve the question put to it by the Fifth Circuit.

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[7]United States v. Louisiana, 543 F.2d 1125, 1126 (5th Cir. 1976).

Despite the fact that the three-judge court was reconvened on three occasions after repeal of 28 U.S.C. § 2281 in 1976,[8] the propriety of the three-judge court was not disputed, or even seriously addressed, by the parties or the court prior to the instant appeal.[9]

However, in 1976 the Fifth Circuit exercised jurisdiction over an interlocutory appeal from a ruling of the three-judge district court in this case denying a petition for intervention. In so doing, the Fifth Circuit overruled its prior decision in Weiser v. White, 505 F.2d 912 (5th Cir. 1975), requiring such appeals to proceed directly to this Court. The decision was based upon this Court's narrowing of the scope of review of three-judge

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[8]See Act of August 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119, § 7 (1976).

[9]The issue was addressed in passing in 1988: one sentence appears in the district court opinion, without analysis or citation, stating simply that the request for a three-judge court had been properly made in this case (J.A. 10a).

court cases under 28 U.S.C. § 1253, and in particular upon MTM v. Baxley, 420 U.S. 799 (1975), where the Court ruled that a direct appeal would lie only where the order of the three-judge court rested on constitutional grounds. Thus, the Fifth Circuit previously exercised jurisdiction over an appeal from a non-constitutionally based decision in this case in 1976 -- and it did so again in 1981.[10]

2. Allegations Of The Complaint Affecting Jurisdiction

Neither the original Complaint filed in this case in 1974 nor the Amended Complaint filed in 1980 challenge any state law, statute, or regulation as unconstitutional (J.A. 153a-65a, 166a-81a). Instead, both allege that "acts and practices" of state officials maintain and perpetuate

[10]United States v. Louisiana, 543 F.2d 1125 (5th Cir. 1976); United States v. Louisiana, 669 F.2d 314 (5th Cir. 1982)(denial of a petition for intervention).

the dual system previously mandated by state law (J.A. 162a, 176a). Similarly, no request was made to enjoin any state statute or law on grounds that it violated the Constitution (J.A. 162a-63a, 177a).

The gravamen of the Complaint is a challenge to state practices by multiple state officers acting under the authority of state laws themselves left unchallenged. Indeed, in its Memorandum in Support of The Request for A Three-Judge Court, the United States expressly acknowledged that its "Complaint . . . seeks relief . . . which will enjoin the practices of the State of Louisiana as applied and interpreted by the defendants and their agents" (J.A. 193a-94a)(emphasis added). The "Complaint alleges that the defendants and their agents have failed in their affirmative duty to provide specific measures and timetables to eliminate [the racial] dualism" (J.A. 195a).

3. Basis For The Relief Ordered Below

When, in 1981, the parties agreed on a settlement and the court below approved it, no state statute, law, or regulation was stricken or limited in enforcement (J.A. 199a-255a, 256a-66a).

Although in 1989 the State itself advocated a remedial plan, which the court below approved, that substantially restructured Louisiana's higher education system,[11] neither the State nor any other party contended that the supersession of numerous existing provisions of Louisiana law necessary to accomplish that goal should be directed because any of such provisions were repugnant to the federal Constitution.[12]

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[11]See Appendix to Jurisdictional Statement of Governor Roemer, at 25a-31a.

[12]The Southern University Supervisors objected to the plan (J.A. 721a-29a), and the United States "remain[ed] skeptical that the record in this case [could] support the finding that a single board is warranted or that it will enhance desegregation" (J.A. 603a; accord (continued...)

The remedial order entered below is grounded solely upon a federal statute -- Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq. The district court expressly declined to reach the issue whether the United States had standing to sue under the Fourteenth Amendment, concluding that "whatever relief is available to a private plaintiff in a school desegregation suit under the Fourteenth Amendment is available to the United States under Title VI" (J.A. 17a, 84a).[13]

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[12](...continued)
J.A. 1077a). The State never argued that existing Louisiana law violated the federal Constitution.

[13]While there is language in the district court's opinions that invokes the Constitution as the basis for striking the multiple board system (e.g., J.A. 45a), it is clear from the collective opinions of the court, and emphasized in its Reasons for Ruling (August 4, 1989) (J.A. 84a), that the judgment below rested on statutory grounds. Because it concluded that the substantive standard under Title VI was the same as that under the Fourteenth Amendment (J.A. 17a, 22a, 24a), the court in its opinions referred to the Constitution and Title VI interchangeably.

SUMMARY OF THE ARGUMENT

The appeal from the district court's decision must proceed initially in the Court of Appeals for the Fifth Circuit, not this Court. Because the case was not one "required by any Act of Congress to be heard and determined by a district court of three judges," the three-judge court was improperly empaneled and therefore the requirements for direct appeal under 28 U.S.C. § 1253 are not satisfied.

A three-judge court may be convened properly under Section 2281 only if the complaint raises a federal constitutional challenge to an identified state law or regulation and requests that enforcement of the state law or regulation be enjoined on the ground of its repugnance to the federal Constitution. Morales v. Turman, 430 U.S. 322 (1977) (per curiam); Costello v. Wainwright, 430 U.S. 325 (1977) (per curiam); Baxter v. Palmigiano, 425 U.S.

308 (1976); Butler v. Dexter, 425 U.S. 262 (1976) (per curiam). No such challenge was raised here (J.A. 153a-83a.); thus, a three-judge court should never have been empaneled and most assuredly should not have been reconvened once it became clear that it had been improperly empaneled at the outset.

Moreover, the correct procedure in cases raising both constitutional and non-constitutional claims is to have a single judge make an initial determination of the statutory issues -- which may obviate the need to convene a three-judge court. Hagans v. Lavine, 415 U.S. 528, 543-44 (1974); Rosado v. Wyman, 397 U.S. 397, 403 (1970). Had this procedure been followed in the instant case, there would have been no need to convene a three-judge district court.

This conclusion is bolstered by the fact that the three-judge court here was convened and reconvened

ultimately to render a decision resting only on statutory grounds, Title VI (J.A. 17a). The Court has held that a three-judge court is not required in these circumstances. MTM, Inc. v. Baxley, 420 U.S. 799 (1975); Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974).

This appeal should proceed in the Court of Appeals for the Fifth Circuit and the stay issued by this Court should, pursuant to the All Writs Act, 28 U.S.C. § 1651, remain in effect during the pendency of appellate proceedings.

ARGUMENT

A. The Court Lacks Jurisdiction To Entertain This Direct Appeal Because The Case Was Not Required To Be Heard By A Three-Judge Court As No State Law Was Challenged Or Enjoined on Constitutional Grounds.

The Jurisdictional Statements rely on 28 U.S.C. § 1253 as the basis for this Court's jurisdiction of these

appeals. That section allows direct appeals to this Court from an order granting or denying an interlocutory or permanent injunction in any civil action "required by any Act of Congress to be heard and determined by a district court of three judges." (Emphasis added.) This Court's appellate jurisdiction under Section 1253 turns on whether the three-judge court was correctly convened.[14]

1. Appellants apparently contend that 28 U.S.C. § 2281 required this case to be heard by three judges.[15]

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[14]Gonzalez v. Automatic Employees Credit Union, 419 U.S. at 95 n.12.

[15]Section 2281 was repealed by Congress in 1976 but remains applicable to actions commenced before the date of repeal. Act of August 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119, § 7 (1976). It provided that

> an interlocutory or permanent injunction restraining the enforcement . . . of any State statute . . . shall not be granted by any district court or judge thereof upon the ground of unconstitutionality of such statute unless the application therefore is heard and determined by a district court of three judges.

The statute is to be strictly construed. Allen v. State Board of (continued...)

However, this Court has unanimously held that Section 2281 required a three-judge court only where the initial pleadings framed a challenge to a specific state law provision on constitutional grounds[16] and requested an injunction against enforcement of an identified state law or regulation on constitutional grounds.

In Costello v. Wainwright, 430 U.S. 325 (1977) (per curiam), the Court held:

> The applicability of § 2281 as written turns on whether a state statute is challenged to be unconstitutional, not on whether an equitable remedy for unconstitutional state administrative behavior ultimately impinges on duties imposed under concededly constitutional state statutes.

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[15](...continued)
Elections, 393 U.S. 544, 561 (1969); Phillips v. United States, 312 U.S. 246, 251 (1941).

[16]The challenge must be based upon a provision of the Constitution other than the Supremacy Clause. Swift & Co. v. Wickham, 382 U.S. 111 (1965).

Id. at 326.[17] Likewise in Morales v. Turman, 430 U.S. 322 (1977) (per curiam), the Court emphasized that the threshold requirements for convening a three-judge court must be satisfied in the complaint, which must contain (1) a specific challenge to a state statute, rule or regulation, and (2) a request for an injunction against the enforcement of an identified law.[18] In rendering this holding in Morales, the Court relied on a decision reached a year earlier in Baxter v. Palmigiano, 425 U.S. 308 (1976).[19] Morales, 430 U.S. at 323 (citing Baxter,

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[17]In Costello this Court rejected the contention that a three-judge court was required because equitable relief for prison overcrowding might require suspending or superseding a state statute.

[18]The Court in Morales reversed a ruling that a three-judge court was required because a constitutional challenge to inhumane conditions maintained by state officials in Texas juvenile correctional facilities was effectively a challenge to a state-wide policy.

[19]Baxter involved a challenge to the denial of counsel and the use of a prisoner's silence against him in a prison disciplinary proceeding. The Court found that despite the fact that the state had detailed regulations governing prison disciplinary proceedings, the regulations did not address the right to counsel or the use of an (continued...)

425 U.S. at 313 n.2);[20] accord Butler v. Dexter, 425 U.S. 262 (1976) (per curiam).[21]

The record in this case makes clear that this threshold requirement was not met. Neither the original Complaint nor the Amended Complaint challenged any identified state constitutional provision, statute or regulation, nor was there any request to enjoin the enforcement of any identified state law (J.A. 153a-

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[19](...continued)
inmate's silence. "[The] complaint did not mention or challenge any rule or regulation of the Authority; nor did it seek an injunction against the enforcement of any identified rule." Baxter, 425 U.S. at 313 n.12. Thus, the Court concluded that a three-judge court was not required. Id.

[20]In the instant matter, had the Complaint in 1974 challenged the constitutionality of some provision of Louisiana law that purported explicitly to require racial segregation in the state's higher education system, a three-judge court still would not have been "required." Bailey v. Patterson, 396 U.S. 31 (1962)(where unconstitutionality is beyond dispute, single judge may enjoin state law).

[21]In Butler the Court held that it lacked jurisdiction of an appeal from an injunction granted by a three-judge court where local officials had acted unconstitutionally in using a state statute as a pretext for arrest and where no question of the constitutionality of the underlying statute was presented to the three-judge court.

183a). The United States' request for a three-judge court was admittedly founded not upon a direct attack to a state law on constitutional grounds, but rather on a claim that defendants' "acts and practices" in carrying out their duties were unconstitutional (J.A. 191a).

The State, through Governor Roemer, makes several novel arguments to support its claim that this Court does have direct appellate jurisdiction. For example, the Governor argues that this case is within the parameters of Section 2281 because it is a suit seeking to interpose the Constitution against enforcement of delegated legislation, in the form of the Board of Regents' Master Plan (Jurisdictional Statement of Governor Roemer at 11-12). The argument will not withstand scrutiny. The United States' specific complaint about the Master Plan was that it "fails to address the dismantling of the State's racially dual system of higher

education" (Appendix to Jurisdictional Statement of Governor Roemer [hereafter Roemer Appendix] at 69a).[22] Thus the challenge raised here is very much like that made in Costello, where effectively it was the absence of a policy that caused the condition that offended the Constitution.[23]

Here the Complaints allege that the absence of an affirmative policy to dismantle the dual system, combined with numerous decisions of the multiple administrative decision makers, creates the constitutionally offensive condition. The Complaints focus throughout on the establishment of the dual system and allege that the defendants have failed in their affirmative duty to provide

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[22]The 1974 Complaint identifies the Master Plan as simply a proposal (J.A. 162a). It clearly was not a statute or regulation, nor was it being challenged as such.

[23]Plaintiffs in Costello challenged the State's failure to provide medical services to prisoners and to deal adequately with overcrowding. See Costello v. Wainwright, 539 F.2d 547 (5th Cir. 1976).

specific measures and timetables to eliminate the continuing vestiges of that system (J.A. 162a [¶ 26], 177a [¶ 35]). The Complaints do not challenge as unconstitutional any policies or regulations of the Board of Regents (whether contained in its Master Plan or not), or of any other defendant, either on their face or as applied.[24]

This case thus is not about any particular policy or regulation, but rather about the cumulative effect of

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[24]Quoting ¶ 33 of the Amended Complaint, where the United States alleges that the Regents' Master Plan "would maintain and perpetuate the dual system of public higher education based upon race," the Governor characterizes the Master Plan as the equivalent of delegated legislation. (Jurisdictional Statement of Governor Roemer at 12 n.16.) However, while adoption of the Master Plan may not require legislative approval, implementation of its provisions is dependent upon appropriations decisions made by each session of the Louisiana Legislature, which determines whether or not to accept the recommendations of the Board of Regents. (See J.A. 317a-18a [United States' List of Material Facts to the Motion for Summary Judgment, ¶¶ 141-43, 147](referring to Board of Regents' funding recommendations and to disparities in legislative appropriations to historically white and black institutions); J.A. 119a, 122a [1974 Louisiana Constitution, Article VIII, §§ 5(D)(4), 11, 12](Board of Regents recommends funding formula but the Legislature makes discrete appropriations directly to individual institutional governing boards).)

scores of individual decisions by the Governor (who appoints members to the Board of Regents and the three institutional boards) and by each of these bodies which, collectively, perpetuate the State's dual system and thereby violate the Constitution (see Roemer Appendix at 66a-68a).

The State, through the Governor, also misconstrues the record in asserting that the United States directly challenged the 1974 Louisiana Constitution as violative of the federal Constitution (Jurisdictional Statement of Governor Roemer at 13). Relying on selected excerpts from the United States' Interrogatory Responses, the State attempts to construct a direct challenge to its Constitution which (1) does not appear in the original or amended Complaint in this case, and (2) is inconsistent with the United States' position that it is the action and inaction of the numerous decision-making

bodies (admittedly created by the State's Constitution), not their mere existence, that offends the Constitution (Roemer Appendix at 66a-68a). There is in this litigation no direct challenge to the State's Constitution or statutory provisions.

The State's attempt (again through the Governor) to distinguish Costello and Morales also is unavailing. Like Morales, there is no central body of written regulations or policies challenged by the United States in this case and, like Costello, it is the defendants' failure to act under the circumstances -- not the presence of any particular offending regulation or state policy -- that causes the violation.

Costello, Morales, Baxter, and Butler solidly establish that challenges, such as those made here, to multiple unwritten policies or practices of state officials in implementing their duties under state law, are not

required to be determined by a three-judge court. Thus the initial empaneling of the three-judge court was improper.

2. Moreover, when the case was reactivated after the Morales, Costello, Baxter, and Butler cases were decided in 1976 and 1977, the three-judge court should not have been reconvened as it was undoubtedly improper at that time.[25]

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[25]Evolution of three-judge court jurisdiction to its current narrow application grew out of a recognition by this Court and the Congress that the policy behind three-judge courts -- "saving state and federal statutes from improvident doom at the hands of a single judge," MTM, Inc. v. Baxley, 420 U.S. 799, 804 (1975), had become largely anachronistic. See Swift & Co. v. Wickham, 382 U.S. 111, 128-29 (1965) (noting that the three-judge procedure dislocates "the normal structure and function of the lower federal courts," "expands this Court's obligatory jurisdiction," and "contradicts the dominant principle of having this Court review decisions only after they have gone through two judicial sieves") (quoting Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 92-93 (1960) (Frankfurter, J. dissenting)). See also S. Rep. No. 94-202, 94th Cong., 2d Sess., 3-8, reprinted in 1976 U.S. Code Cong. & Admin. News 1988, 1990-96 (finding that the original rationale that gave rise to the three-judge court concept in 1910 had virtually disappeared). Thus, even before repeal of Section 2281 by the Congress, the Court increasingly limited three-judge court jurisdiction. E.g., Phillips v. United States, 312 U.S. 246 (1941); Swift & Co. v. Wickham, 382 U.S. 111 (1965); (continued...)

B. The Case Was Not Required To Be Heard By A Three-Judge Court Because A Single Judge Should Have Initially Resolved The Statutory Claim And Obviated Any Need For A Three-Judge Court.

In Hagans v. Lavine, 415 U.S. 528 (1974), decided on March 25, 1974, prior to the initial empaneling of the three-judge court in this case, the Court approved as "accurately reflecting recent jurisprudence" the practice of having a single judge initially determine the substantiality of the constitutional claim (as noted above, the threshold prerequisite for applicability of § 2281) and then resolve any statutory claims, convening a three-judge court thereafter and only if the case could not be disposed of on non-constitutional grounds.[26] Accord Rosado v.

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[25](...continued)
Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974); MTM, Inc. v. Baxley, 420 U.S. 799 (1975).

[26]The Court in Hagans acknowledged that its holding "may appear at odds" with two prior opinions, Brotherhood of Locomotive Engineers v. Chicago, R.I. & P.R., 382 U.S. 423 (1966) and Florida (continued...)

Wyman, 397 U.S. 397, 403 (1970) (resolution of statutory claim initially by a single judge would avoid consuming the time of three federal judges in a matter not required to be determined by a three-judge court).[27] Under these precedents, the three-judge district court should have never been convened in this case.

This conclusion is further supported by the fact that the three-judge court was reconvened in order to reach a judgment that rests exclusively upon non-

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[26](...continued)
Lime & Avocado Growers v. Jacobsen, 362 U.S. 73 (1960), but it declined to follow them because it concluded that the Hagans holding "accurately reflects the recent evolution of three-judge-court jurisprudence." Hagans, 415 U.S. at 543-44. Both those earlier cases cited, however, do satisfy the threshold requirement (not met here) of a facial challenge to a state statute on constitutional -- non-Supremacy Clause -- grounds.

[27]In Philbrook v. Glodgett, 421 U.S. 707, 712 n.8 (1975), the Court excused the district court's failure to follow the procedure approved in Hagans because the complaint raised only constitutional claims and the statutory claim arose for the first time at oral argument before the three-judge court. Accord Alexander v. Fioto, 430 U.S. 634, 636 nn.6 & 7 (1977) (only basis of claim set out in the complaint was unconstitutionality of a statute).

constitutional grounds. See supra note 13. The Court has ruled repeatedly that a three-judge court is not required to render a ruling on a non-constitutional challenge to state law. Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974), holds that denial, on non-constitutional grounds, of a requested injunction against a state law need not be issued by a three-judge court. Similarly, the Court ruled in MTM, Inc. v. Baxley, 420 U.S. 799 (1975), that a direct appeal under Section 1253 from the denial of an injunction was proper only where the three-judge court's order was based on the merits of a constitutional claim.[28]

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[28]See also United States v. Texas, 523 F. Supp. 703, 724-28 (E.D. Tex. 1981) (district court declined to request a three-judge court in action initiated prior to repeal of § 2281 where there was no direct attack on the constitutionality of a state statute and the court concluded it would be inappropriate to expand the parameters of § 2281 in light of the repeal); Bradley v. School Board of City of Richmond, 324 F. Supp. 396, 398 (E.D. Va. 1971) (district court declined to request a three-judge court because even if the relief ordered would require non-compliance with a state law, "such an (continued...)

Thus, a three-judge court was not "required" for the purpose of rendering the orders below and direct appeal under Section 1253 does not lie.

CONCLUSION

For these reasons, LDF urges the Court to dismiss this appeal and direct that the parties seek review in the United States Court of Appeals for the Fifth Circuit. LDF also urges the Court to exercise its authority under

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[28](...continued)
injunction would not necessarily be 'upon the ground of the unconstitutionality of such statute'"); accord United States v. Louisiana, 543 F.2d 1125 (5th Cir. 1976).

the All Writs Act, 28 U.S.C. § 1651, to maintain its stay of the district court's order during the pendency of the appellate proceedings.

Respectfully submitted,

*Julius LeVonne Chambers
Charles Stephen Ralston
Norman J. Chachkin
Janell M. Byrd
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street
16th Floor
New York, NY 10013
(212) 219-1900

Counsel for Amicus Curiae
*Counsel of Record